Supreme Court, U.S.
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No. 95-1035

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS F. WERNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff in a Quiet Title Act suit may establish an easement across federal property solely by virtue of state statutory law.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 68 F.3d 486 (Table). An opinion of the court of appeals at an earlier stage of the litigation (Pet App. 3a-13a) is reported at 9 F.3d 1514. The December 16, 1994 order of the district court (Pet. App. 14a-23a) is unreported. The August 12, 1992 judgment and order of the district court (Pet. App. 24a-38a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1995. The petition for a writ of certiorari was filed on December 26, 1995 (a Tuesday

following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are owners of land located on Choctawhatchee Bay in Okaloosa County, Florida. Their property is bounded on three sides by water, and on the fourth side by Eglin Air Force Base. Petitioners trace their title from a warranty deed dated May 22, 1922, transferring their property between private parties. The portion of Eglin Air Force Base that is adjacent to petitioners' land has been federal property since the Treaty of Cession of the Floridas was ratified on February 19, 1821. Pet. App. 3a-6a. Immediately prior to its transfer to the military, the federal land was part of the Choctawhatchee National Forest administered by the Forest Service, a component of the United States Department of Agriculture. Pursuant to an Act of Congress, the property was transferred to the War Department (the predecessor to the Department of the Army) in 1940. Act of June 27, 1940, ch. 437, 54 Stat. 655. Pet. App. 29a-30a.

The portion of Eglin Air Force Base at issue in this case was initially used for military housing. An access road to the housing complex was constructed by the military. In 1956, the housing was removed, and the area was dedicated to recreational purposes. At that time, the access road was extended to the western boundary of petitioners' property in order better to serve the recreation area and a Navy observation site. Pet. App. 16a. In 1980, the Air Force placed an electric gate on the road that required an access card to gain entry. In 1987, when petitioners acquired their property, they obtained

access cards because they were civilian employees at the base. Since that time, the Air Force has changed the means of access to a manned entry system that affords access only between 7 a.m. and 10 p.m. daily. *Ibid.*

2. Petitioners commenced the present action in 1991 under the Quiet Title Act, 28 U.S.C. 2409a, seeking to establish their title to an easement across that portion of Eglin Air Force Base that is adjacent to their property. Specifically, they claimed an easement right under Section 704.01(2), Florida Statutes (West Supp. 1996), which provides for a statutory right of way for otherwise inaccessible properties. In 1992, the district court dismissed the action for failure to satisfy the Quiet Title Act's twelve-year statute of limitations. 28 U.S.C. 2409a(g). Pet. App. 25a-38a. In 1993, the Eleventh Circuit reversed that dismissal, ruling that the limitations period did not commence until 1980, when the gate was erected on the access road. *Id.* at 8a.

3. On remand, the district court granted summary judgment for the United States on the merits. The court "assume[d], without deciding, that in the appropriate circumstances, an easement by necessity may be asserted against the United States pursuant to the Quiet Title Act." Pet. App. 20a. It held, however, that federal common law principles govern whether such an easement exists in a particular case. *Ibid.* Because petitioners conceded that they could not satisfy the federal common law requirement of unity of title, the court ruled that they could not establish an easement across the military base. *Ibid.*; see also *id.* at 22a. The court rejected petitioners' argument that, by enacting the Quiet Title Act, Congress implicitly authorized the recognition of

property interests in federal lands by the unilateral operation of state law. Pet. App. 23a.

The court of appeals affirmed in a *per curiam* order. Pet. App. 1a-2a.

ARGUMENT

The court of appeals' decision that state law is not controlling in this Quiet Title Act suit is correct, and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioners seek to establish an easement across federal property solely under the authority of state statutory law. It is axiomatic, however, that rights to federal property may be established only under federal law. See, *e.g.*, *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 403-405 (1917). To the extent that federal property is subject to the doctrine of easement by necessity,* such easements must arise from federal law. Petitioners' contention (Pet. 6-8) that Congress intended to subject federal lands to state-created property rights through the Quiet Title Act is without support in the text or legislative history of the Act.

2. Petitioners' principal contention (Pet. 6-8) is that the court of appeals' decision is contrary to *Shultz* v. *Department of the Army*, 10 F.3d 649 (9th

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* A 1980 Opinion of the Attorney General concluded that access easements may in theory be derived from the intent of Congress in enacting land grant legislation that results in isolated private land holdings. 43 Op. Att'y Gen. 26, at 17-18 (1980). Such "easements by implication" differ from common law "easements by necessity" because the former depend upon the intent of Congress, rather than the "presumed intent" of the parties that controls at common law.

Cir. 1993). The Ninth Circuit granted the government's petition for rehearing in *Shultz* in September 1994. The appeal has remained pending on rehearing since that date (although the existing opinion has not been vacated). As a result, even if the decision below were in conflict with the opinion in *Shultz*, that conflict might be resolved by the Ninth Circuit after rehearing.

In any event, the decision below is consistent with *Shultz*. Like the present case, *Shultz* involved a claimed right of way across a military base. There, however, the Army had withdrawn the land on which the base was built "subject to valid existing rights including any then-existing easements." 10 F.3d at 654 (internal quotation marks omitted). The court in *Shultz* looked to state law principles to determine (1) whether a public highway had been constructed under Rev. Stat. 2477, 43 U.S.C. 932 (repealed 1976), before the land was withdrawn by the Army, and (2) whether a prescriptive easement had been established over portions of the base that had briefly been in private ownership before the reacquisition of the land for use by the Army. *Shultz*, 10 F.3d at 654.

State law was relevant to the existence of a right of way under Rev. Stat. 2477 because such an easement "comes into existence automatically when a public highway [is] established across public lands in accordance with the law of the state." *Shultz*, 10 F.3d at 655 (internal quotation marks omitted). The existence of a prescriptive easement depended on state law because that law defined the rights created in the property during the period that the land was in private ownership. *Id.* at 660. State law rights that were not acquired or otherwise extinguished by the

Army when it regained the land would continue to limit the Army's title. *Id.* at 655.

In sum, while the decision in *Shultz* recognized a role for state law in that case in giving substance to a federal statutory grant and in limiting the extent of acquired federal title, *Shultz* does not support the proposition that state law may independently create a private easement right over federal property. Thus, even if the Ninth Circuit were to reaffirm its earlier ruling in *Shultz*, its decision would not conflict with the holding in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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